

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD CHASE,

Defendant.

Case No. 2:06-cr-00065-PMP-PAL

**ORDER**

(M/Strike- #36)  
(M/FRE Rule 404(b) Notice - #37)

This matter is before the Court on Defendant Richard Chase's Motion to Strike Surplusage from Superseding Indictment (#36), filed October 5, 2006. The government filed a Response (#40) on October 12, 2006. Also before the court is the defendant's Motion for FRE Rule 404(b) Notice of Government's Intent to Use Other Acts, Crimes, Wrongs Evidence at Trial (#37), filed on October 5, 2006. The government filed a Response (#41) on October 12, 2006. The motion for FRE 404(B) Notice largely incorporates the arguments raised in the motion to strike and will therefore be considered together.

**BACKGROUND**

The defendant, Richard Chase ("Chase"), is charged in a criminal indictment returned February 22, 2006, with receipt of child pornography in violation of 18 U.S.C. § 2252(A)(a)(2) and possession of child pornography in violation of 18 U.S.C. § 2252(A)(a)(5)(B). The indictment also contains forfeiture allegations. A superseding indictment returned August 30, 2006, added a reference within each count to Chase's prior conviction in California state court for a lewd act upon a child in violation of California Penal Code § 288(a).

In the present motions before the court, Chase objects to the government's inclusion of references to his prior conviction under § 288(a) under two theories. First, he argues that the references

are surplusage which will prejudice the jury in violation of his due process rights and therefore must be stricken from the superseding indictment pursuant to Federal Rule of Criminal Procedure 7(d). Second, he contends that the references fall under Federal Rule of Evidence 404(b), which requires the prosecutor to provide pretrial notice of intent to use the references at trial. Chase argues that reference to his prior conviction for a lewd act upon a child is not an element under either § 2252(A)(a)(2) or § 2252(A)(a)(5)(B), and therefore is unnecessary to the indictment. He also contends that the references to his prior conviction will prejudice him by causing the jury to make assumptions about his character, weaken the presumption of innocence, and deny his due process rights at trial. He seeks an order striking references to his prior conviction as surplusage. Additionally, he argues that this prior conviction falls under the category of other crimes, wrongs, or acts for which Rule 404(b) requires the prosecutor's pretrial notice of intent to use at trial. He seeks an order "directing the Government to provide NOTICE of all FRE 404(b) evidence which the Government intends to introduce at trial." (Mot. for Notice at 5.) (emphasis in original).

The government responds that "it is well-known within this District" that the government "routinely" includes references to a defendant's prior conviction in this type of indictment to put the defendant on notice of the increased statutory maximum. (Resp. to Mot. to Strike at 1:20-23.) The government also indicates that it is also "well-known within this District" that evidence of a prior conviction is not submitted to the jury during trial, citing the Supreme Court's decisions in U.S. v. Booker, 543 U.S. 220 (2005), and Apprendi v. New Jersey, 530 U.S. 466 (2000). (Id. at 1:23-2:3.) The government responds to Chase's request for a notice under Rule 404(b) that it is "well aware" of the rule and its requirements, and that it will timely comply with the rule should it intend to submit such evidence. (Resp. to Mot. for Notice at 1:18-20.)

## **DISCUSSION**

### **I. Surplusage**

Federal Rule of Criminal Procedure 7(d) provides that "[u]pon the defendant's motion, the court may strike surplusage from the indictment or information." Surplusage has been defined as: "Any allegation without which the pleading would remain adequate in law" Brady v. U.S., 24 F.2d 397, 399 (1928). "The purpose of Rule 7(d) is to protect a defendant against prejudicial or inflammatory

allegations that are neither relevant nor material to the charges.” U.S. v. Ramirez, 710 F.2d 535, 544-45 (9th Cir. 1983). For example, the Fourth Circuit found that the district court improperly refused to strike a reference to the nature of a defendant’s prior felony conviction when the defendant was charged with felon in possession of a firearm. U.S. v. Poore, 594 F.2d 39, 43 (4th Cir. 1979) (cited with approval in Ramirez, 710 F.2d at 545). The court found that reference to the defendant’s prior conviction for carrying a handgun would prejudice the jury when the defendant had already stipulated to the fact of his prior conviction for a felony without reference to the nature of the felony. Id. By contrast, in U.S. v. Terringno, 838 F.2d 371, 373 (9th Cir. 1988), the Ninth Circuit held that the inclusion in the indictment of the factual circumstances surrounding the defendant’s scheme to embezzle federal funds might have been “somewhat prejudicial,” but was also “relevant and material to the charge of embezzlement” because the government needed that factual information to prove the intent element of the crime. Denial of a motion to strike surplusage is reviewed for abuse of discretion. Id. at 373 (citing Poore, 594 F.2d at 41).

Chase is charged with one count of violating § 2252(A)(a)(2) and one count of violating § 2252(A)(a)(5)(B), neither of which statutes contain an element that the perpetrator must have been convicted of any other offense.<sup>1</sup> Therefore, reference to Chase’s prior conviction for violation of

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<sup>1</sup>Section 2252(A)(a)(2) applies to any person who:

(2) knowingly receives or distributes -

(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer . . .

Section 2252A(a)(5)(B) applies to any person who:

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer . . .

1 § 288(a) is unnecessary to the superseding indictment as it is not an element of the crimes charged in  
2 either count, nor material or relevant to factual circumstances underlying the charge. The references to  
3 Chase's prior conviction for a sex offense are highly prejudicial, especially given the nature of the  
4 offenses with which he is charged.

5 The government responded that it "routinely" includes prior convictions within this type of  
6 indictment to make the defendant aware of the maximum possible sentence, and indicates that it is  
7 aware that such information should not be submitted to the jury, citing the Supreme Court's decisions  
8 in Apprendi and Booker. In Apprendi, the court announced that "[o]ther than *the fact of a prior*  
9 *conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum  
10 must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis  
11 added). Booker applied this rule on so-called "sentence enhancements" to the Federal Sentencing  
12 Guidelines. 543 U.S. at 243-44. Neither decision supports the government's argument the prior  
13 conviction is appropriately included in the superseding indictment. The superseding indictment is  
14 adequate in law without reference to the prejudicial and inflammatory allegations that Chase was  
15 previously convicted of a lewd act upon a minor. The court therefore finds the references to this  
16 conviction should be stricken as prejudicial surplusage.

17 **II. Rule 404(b) Notice Request**

18 Federal Rule of Evidence 404(b) provides that:

19 Evidence of other crimes, wrongs, or acts is not admissible to prove the  
20 character of a person in order to show action in conformity therewith. It  
21 may, however, be admissible for other purposes, such as proof of motive,  
22 opportunity, intent, preparation, plan, knowledge, identity, or absence of  
23 mistake or accident, provided that upon request by the accused, the  
24 prosecution in a criminal case shall provide reasonable notice in advance  
25 of trial, or during trial if the court excuses pretrial notice on good cause  
26 shown, of the general nature of any such evidence it intends to introduce  
27 at trial.

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1 The Advisory Committee Notes to the 1991 Amendments that added the notice requirement to Rule  
 2 404(b) indicate that: "Other than requiring pretrial notice, no specific time limits are stated in  
 3 recognition that what constitutes a reasonable request or disclosure will depend largely on the  
 4 circumstances of each case."

5 Chase's motion seeks an order compelling the government elect whether it plans to introduce  
 6 evidence of Chase's prior conviction at trial, and if so, to provide notice of its intent. The government  
 7 responds that it is aware of the rule, and should it make such an election, it will provide the defendant  
 8 with timely notice pursuant to the rule. The parties entered into a Joint Discovery Statement (#9) which  
 9 obligates the government to provide the court and counsel for Chase sufficient notice prior to trial to  
 10 allow for an admissibility hearing outside the presence of the jury under Rule 104 of the Federal Rules  
 11 of Evidence. Furthermore, Local Criminal Rule 16-1(c) provides that "[b]efore filing any motion for  
 12 discovery, the moving party shall confer with opposing counsel in a good faith effort to resolve the  
 13 discovery dispute." In addition, any motion for discovery must include a statement indicating that after  
 14 personal consultation with opposing counsel, the parties were unable to resolve their dispute. Id. No  
 15 such statement of counsel was attached to Chase's motion.

16 Accordingly,

17 **IT IS ORDERED**

- 18 (1) Defendant Richard Chase's Motion to Strike Surplusage from Superseding  
 19 Indictment (#36) is GRANTED. References to Chase's prior conviction for in  
 20 California state court for a lewd act upon a child in violation of California Penal  
 21 Code § 288(a) shall be STRICKEN from the Superseding Indictment (#28).  
 22 (2) Defendant's Motion for FRE Rule 404(b) Notice of Government's Intent to Use  
 23 Other Acts, Crimes, Wrongs Evidence at Trial (#37) is DENIED.

24 Dated this 12th day of December, 2006.

25  
 26   
 27 PEGGY A. LEEN  
 28 UNITED STATES MAGISTRATE JUDGE